

No. 12,348

IN THE

United States Court of Appeals
For the Ninth Circuit

TOWN OF FAIRBANKS, ALASKA (a municipal
corporation),

Appellant,

VS.

UNITED STATES SMELTING, REFINING AND
MINING COMPANY, INC., and CHARLES
SLATER,

Appellees.

BRIEF FOR APPELLEE, CHARLES SLATER.

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Attorney for Appellee,

Charles Slater.

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STATEMENT.

The only assignment of error presented by Appellant is that the Court erred in dismissing its petition. This involves the construction of Sec. 16-1-22 of the Alaska Compiled Laws, Annotated, which is copied on pages 3 and 4 of appellant's brief.

The act in question specifically states what the petition for annexation must contain. Among other things it provides:

1. The petition must be signed by a majority of the owners of substantial property interest in land or posses-

sory rights in land, tide lands, or improvements on land or tide lands within the limits of the territory so proposed to be annexed.

2. That the petition must contain the number of owners of property in the territory proposed to be annexed.

The act also provided that the Court shall order an election unless the petition fails to comply with the requirements of the act.

The petition alleged that there were 282 owners of property within the area and appellee admitted that there were 282 owners and affirmatively alleged that there were more than 310 such owners.

The petition alleged that the persons who signed the petition were qualified to sign and that they constituted a majority of the owners of substantial property interest in land or possessory rights in land or improvements upon land within the limits of the territory sought to be annexed. This allegation of the petition was denied by appellee.

The evidence offered by appellant at the hearing in support of the allegations contained in its petition showed 207 of the alleged and admitted 282 owners within the area and that 106 signed the petition.

ARGUMENT.

The attorney for appellant bases his argument on that part of the act (last paragraph of Sec. 16-1-22, A.C.L.A.) which provides that the owners of land within the area

sought to be annexed who filed statements of their ownership in the Land Office shall be presumed to be such owners in the absence of a clear showing to the contrary. He contends in effect that this paragraph of the act repeals that part of the act which requires that the petition must be signed by a majority of the owners of substantial property interest in land or possessory rights in lands, tide lands, or improvements upon lands or tide lands within the limits of the territory so proposed to be annexed. In plain words it is his contention that in an area sought to be annexed where there are 1,000 admitted owners of interests in property entitled to sign the petition, and that if only 5 of them have filed their statement of ownership in the Land Office, that upon a showing to the Court that 3 of these signed the petition it becomes the duty of the Judge, on his own motion, to immediately amend the petition, find that there are only 5 owners of property within the area and that the 3 owners constitute a majority, allow the petition and order an election.

The act also provides that in the event of an election all persons 21 years of age or more, who are the owners of substantial property interest in land, buildings or improvements on land or tide land within the territory proposed to be annexed are entitled to vote. To be consistent, counsel must contend that only the 5 who registered their statement in the Land Office would be entitled to vote.

As a matter of fact, the only purpose of this paragraph of the act is to make the filing of the statement of ownership in the Land Office *prima facie* evidence that the person filing the statement is the owner of land. This show-

ing is sufficient unless competent and satisfactory evidence to the contrary is shown. It merely shifts the burden of proof as to those persons filing their statements from the petitioner to the protestants.

There is nothing in the act to support the contention that the Legislature intended to force the people to the expense of an election on the filing of a petition signed by less than a majority of the owners of property interests in the area proposed for annexation.

There is nothing in the act that creates a presumption that persons who have not registered their titles or who are not required to register titles are not interested. Only the actual owners of land are required to file their statements in the Land Office. It seems ridiculous to claim that a person occupying premises in the proposed area under a contract of sale, with a deed in escrow, with only a small payment to make before receiving his deed, is not interested. The record owner who has filed his sworn statement would have no interest whatever in the land after the final payment under the contract.

There is no question about the right of the Court to consider the complaint in an action, amended to conform to the proof, but this principle of law is not involved in this proceeding. In the first place, it was not contended by counsel that there were not 282 owners of substantial property interest in land or possession in land or improvements in land in the territory sought to be annexed. He claimed and still claims that the only persons interested and to be considered were the owners of land, who were required to file and did file their sworn statements.

There is nothing in the act which indicated that the Court should exclude and not consider all qualified owners of interests in property who were not required to file certificates. At the trial no evidence of any kind was presented, or was it claimed that more than 106 qualified persons had signed the petition.

The whole purpose of the hearing was to enable the Court to determine whether or not there should be an order for an election. If the petitioner failed to comply with the requirements of the act or if it was not shown that the required number of competent persons had signed the petition, it was the duty of the Court to deny the petition. It may be that the motion should have been that the petition be dismissed and not for a nonsuit but that is immaterial because there was no evidence before the Court that the required and qualified number of persons had signed the petition. It was not incumbent upon protestants to disprove something which the petitioner had made no attempt to establish.

If the Legislature had intended that the mere filing of a petition was all that was necessary it would have said so in plain words and made no provision for a hearing on the petition.

It is the contention of counsel that any kind of a petition can be filed, regardless of the correctness of the allegations and that then the burden of proof shifts to the protestants to prove that the admitted allegations are true and that those that he denies are admitted unless he produces satisfactory evidence that they are not true. There is nothing in the act that supports his contention.

To hold that the protestant should prove petitioner's case for it would be contrary to all established judicial procedure. The order dismissing the petition should be affirmed.

Dated, Fairbanks, Alaska,
April 3, 1950.

Respectfully submitted,

JULIEN A. HURLEY,

*Attorney for Appellee,
Charles Slater.*